IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Pramod Kumar and another.
vs.
Bherulal.

S.B.CIVIL SECOND APPEAL NO.186/2003 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 26.2.2003 PASSED BY SHRI JAGDISH SINGH, ADDITIONAL DISTRICT JUDGE, NATHDWARA IN CIVIL APPEAL NO.51/2001.

DATE OF JUDGMENT ::: 10.1.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. Chaitanya Gahlot, for the appellants.
Mr. Pradeep Shah, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

Following substantial question of law is involved in this appeal :-

"Whether the first appellate court erred in law in decreeing the suit of the plaintiff so far as it relates to Gokhra and Chajja ?"

At the request of learned counsel for the parties, the appeal is finally disposed of.

Brief facts of the case are that the plaintiff/respondent filed a suit against the defendants/appellants for mandatory and prohibitory injunction alleging that the plaintiff and the defendants are neighbours having their house adjoining to each other. The defendants started construction of the house after demolishing his old house. The construction continued for 10-15 days when the plaintiff was not in the town. When the plaintiff reached to his house on 5.5.1996, he found that that the defendants have constructed some projections measuring 3 feet x 10 feet hanging over public chowk. The defendants also raised some construction adjoining to the wall of the plaintiff's house. The plaintiff's grievance is that because of the said projections of the defendants, the plaintiff will not be able to construct his projections of the same type. The plaintiff's claim is based on his alleged right that every person has right to use the land of chowk and, therefore, the plaintiff has also equal right to use the land of the public chowk and, therefore, he can construct his projections hanging over the public chowk. The grievance of the appellant is twofold. One was as above and second is that some portion has been constructed or put by the defendants touching and adjoining to the house of the plaintiff.

The trial court after trial, decreed the suit of the plaintiff so far as structure which was adjoining to the

house of the plaintiff and decreed that the said structure be removed by the defendants. The said decree of the trial court was challenged by the plaintiff for getting more relief. The appellate court vide judgment and decree dated 26.2.2003 allowed the appeal of the plaintiff and directed the defendants to remove the Ghokra and Chajja which were projecting over the public chowk.

Learned counsel for the appellants submitted that the appellants also have right to put their projections unless it is hit by any provision of law rather say it is admitted case of the plaintiff himself that the projections can be there as the plaintiff himself claimed that in case the projections of the defendants will continue, the plaintiff will not be able to put his projections. Therefore, there is no dispute that the parties have right to put projections or Chajja, Rosh etc. It is also submitted by learned counsel for the appellants that the projections in the house of the defendants/appellants were in existence and after demolition of the old house, when the defendant raised new construction, the plaintiff took this opportunity and filed the suit for injunction. The trial court rightly did not decree the plaintiff's suit so far as the said projections are concerned. The appellate court very cursorily passed the decree for removal of the structure without deciding any of the point which is required to be decided before passing the decree for mandatory injunction. The appellate court did not consider what are the rights of the parties over the public chowk

and if the plaintiff can claim right to raise projection over the public chowk, than how he can raise objection to the defendants raising projections that too of a width of only three feet which cannot affect right of any neighbour. The projection of 3 feet by 10 feet from the wall of the house of the defendants neither can be any hindrance in the peaceful enjoyment of the public chowk nor it can affect air and light of the plaintiff in any manner.

Learned counsel for the appellants also emphatically submitted that the plaintiff cannot maintain the suit for injunction because he himself wanted to raise and still want to raise projection after getting the removal of chajja or rosh of the defendants and the equitable court should not have granted such type of the decree.

Learned counsel for the respondent/plaintiff vehemently submitted that it is admitted case that new projections were constructed by the defendants that too in the absence of the plaintiff, therefore, the appellate court was right in decreeing the suit in toto.

I have considered the submissions of learned counsel for the parties and perused the reasons given by the two courts below.

It is not in dispute that the plaintiff's entire case is that because of the projections over the public chowk, the plaintiff will not be able to construct his projection. Because of this fact only, the plaintiff was not entitled

of removal of the said Chajja and Gokhara which the defendants constructed near plaintiff's house. The appellant court did not consider what is the effect of construction of said Gokhara and Chajja and how it has affected adversely the plaintiff. In view of the above, the finding recorded by the first appellate court is absolutely perverse as finding finds no support from any legal provision which entitles the plaintiff to seek the relief of mandatory injunction.

In view of the above, the appeal of the appellants succeed and the judgment and decree of the appellate court dated 26.2.2003 is set aside and the decree of the trial court dated 11.7.2001 is maintained.

There shall be no orders as to cost.

(PRAKASH TATIA), J.

S.Phophaliya